At-will Employment: New Changes and Challenges for Employers

Though at-will employees enjoy legal protections, employers can initiate changes in the relationship to protect the company

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At-will employment is by far the most prevalent form of employment in the United States today, and it typically serves as the default form of employment, unless the employer and employee agree to some other manner of employment. To be employed "at-will" means, literally, that the employee is employed at the will of his or her employer. An employer need not provide any reason for terminating an at-will employee or for changing any of the terms or conditions of employment of an at-will employee, so long as the termination is not unlawful or discriminatory.

Despite the at-will nature of most employment relationships in the Congress and many state legislatures have enacted laws that protect at-will employees. Those laws include:

- the Civil Rights Act of 1964, which protects employees against discriminatory employment practices;
- the Fair Labor Standards Act (FLSA), which establishes a minimum wage and requires the payment of overtime to certain employees;
- various whistleblower protection laws, which protect employees who speak out against potentially illegal acts in which employers engage; and
- various state statutes that prohibit discrimination.

Even with these and other statutory protections, an at-will employment relationship is often still the most desirable form of employment.

Because it is easier for an employer to terminate an employee who is hired on an at-will basis, most employers desire to ensure that employees are, in fact, hired and retained on an at-will basis. In this regard, a company's employee handbook and other documents given to employees at the start of, and during, their employment deserve serious attention. Handbooks and other documents may by used as evidence in both administrative

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and judicial proceedings. Therefore, it is critically important to use careful and deliberate language when drafting employment documents.

Sloppy drafting is particularly dangerous when it includes statements that could be interpreted as some form of guarantee of future employment. Courts may interpret such statements as changing the nature of at-will employment and could give the employee additional rights. Examples of such statements include those that state or imply that employees can expect a "long and happy relationship" with the company; that a supervisor "is here to resolve whatever problems might arise"; or that the company prefers, whenever possible, to "promote from within."

For these reasons, it is important that employers include a prominent, clear and conspicuous disclaimer at the beginning of the handbook – and any other relevant documents – stating that nothing in the handbook or other documents changes the at-will nature of the employment relationship, nor does it create a contract for employment.

Legislature Initiated Changes to At-will Employment

State legislatures and Congress have wrought serious changes to the at-will nature of most employment relationships. Most grant to the at-will employee additional rights not normally present in an at-will employment relationship. These changes also create potential litigation risks an employer must be careful to avoid.

At-will Employees and Employment Discrimination Claims

Even at-will employees cannot be treated in a discriminatory manner. For example, under Title VII of the Civil Rights Act of 1964 (Title VII), the Americans With Disabilities Act and the Age Discrimination in Employment Act, it is illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment or classification of employees;
- transfer, promotion, layoff or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans and disability leave; or
- other terms and conditions of employment.

Discriminatory practices under these laws include:

- harassment on the basis of race, color, religion, sex, national origin, disability or age;
- retaliation against an individual for filing a charge of discrimination, participating in an investigation or opposing discriminatory practices;

- employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, ethnic group, or individuals with disabilities; and
- denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic or religious group.

While surveys tend to show that the number of discrimination claims filed in federal court has fallen in recent years, the number of discrimination charges the Equal Employment Opportunity Commission filed against employers actually increased in 2006. Regardless of the current trends, discrimination remains an important and relevant issue in employment law. Defining workplace discrimination, in theory, sounds relatively simple; in practice, however, the line between innocent behavior and discriminatory behavior, such as sexual harassment, is not always so clear.

Handbook Prohibitions Against Discrimination

The first step toward avoiding and minimizing the negative effects of a discrimination claim begins with something that has already been briefly discussed, the employee handbook. When addressing discrimination in an employee handbook, an employer's first decision is often whether to separate its general anti-discrimination policies from its more specific anti-harassment policies. While the separation may seem redundant, the protections it affords greatly outweigh any costs.

An employer's anti-discrimination policy, in order to adequately place employees on notice, should clearly state that the company will not tolerate discrimination, and will take all necessary and appropriate steps to eradicate it. The policy should state specifically that the company will not discriminate regarding the terms or conditions of employment on the basis of race, color, religion, sex, national origin, disability or age. Furthermore, the policy should provide that it applies to all employees, regardless of their status within the company. Finally, the policy should establish complaint and reporting procedures through which employees can raise specific concerns about perceived discrimination.

A separate anti-harassment policy may seem redundant, or even unnecessary, but a well-drafted anti-harassment policy can be a cost-effective means of providing an employer additional protections. Because harassment – particularly harassment based on sex – can be difficult to define, a clear and specific definition can go a long way toward protecting an employer from harassment claims.

As always, any anti-discrimination or anti-harassment policies are useless, both to employees and as a prophylactic against litigation, if the employees are not made aware of the policies and their rights and duties under them. Therefore, employers should include the policy in any employee handbook or manual and give it to every employee when employment starts. Thereafter, each employee should receive yearly

Definition of "Sexual Harassment"

As a general rule, sexual harassment includes any unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when the conduct either explicitly or implicitly affects an individual's employment, unreasonably interferes with work performance, or creates an intimidating, hostile or offensive work environment.

policy updates. Finally, it is of paramount importance that an employer promptly and seriously respond to any claim of discrimination. The complaint and response process should include careful documentation of all information gathered and any responsive action taken.

The Fair Labor Standards Act: Minimum Wage and Overtime Pay

A second way the government has modified the nature of at-will employment is by enacting the FLSA. The FLSA requires employers of covered employees who are not otherwise exempt to pay a minimum hourly wage of not less than $5.85 per hour effective July 24, 2007; $6.55 per hour effective July 24, 2008; and $7.25 per hour effective July 24, 2009. The FLSA also requires employers to pay covered employees not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 hours per week, unless the employees are otherwise exempt. The FLSA does not limit either the number of hours in a day or the number of days in a week that an employer may require an employee to work. Nor does the FLSA limit the number of hours of overtime that may be scheduled. (For more on regular rates of pay, see chapter 21.)

Large-scale FLSA actions represent an increasing percentage of employment litigation, an estimated 70 percent increase between 2000 and 2003 alone. Most of these involve employees claiming that their employer improperly classified them as exempt from the FLSA's overtime pay requirement. These suits often take the form of a collective action whereby employees of a single employer file suit together and seek compensation for all unpaid overtime.

Know the Exemption

To avoid these suits, an employer must be knowledgeable about the various requirements of the potential exemptions, and recognize when those exemptions are appropriate. The three most common types of exemptions from the FLSA's overtime pay requirement are the exemptions for:

1) executive;
2) administrative; and
3) professional employees.

Each exemption is slightly different, but requires that the employer pay the employee a base salary of $455 per week and that the employee's duties performed for the employer meet certain specific requirements.

Avoiding Litigation

An employer can take several steps to avoid FLSA-based litigation. First, an employer should devise a clearly stated policy regarding the payment of overtime that states which employers are exempt. The employer should also provide clear, detailed job descriptions for all employees, especially those to whom the employer claims any exemption applies. These job descriptions will often form the initial basis for a defense against an employee's claim that an exemption was inappropriately applied. Remember, however, while accurate job descriptions are essential, an employer cannot rely solely on the job descriptions an employee manual contains because inspections by the courts and the DOL will reach far beyond those descriptions.

Employers should also establish a method for employees to complain about perceived problems regarding their compensation. Such complaints should be taken seriously and investigated timely and appropriately. Finally, an employer should perform periodic wage and hour audits of all positions that the employer maintains are exempt from the FLSA's overtime status to ensure that the duties "exempt" employees actually perform appropriately coincide with the requirements of the specific exemptions that the employer claims are applicable.

Whistleblower Protection Laws

"Whistleblower protections" refers to a category of laws that forbid an employer to terminate or retaliate against an employee because he or she has reported or complained of the employer's perceived violation of the law. Whistleblower protection laws exist at both the state and federal level.

State statutes follow different forms, but many include blanket prohibitions on general retaliation or discrimination due to an employee's decision to oppose or disclose employer wrongdoing. In contrast, federal statutes typically include specific provisions that protect employees who report what they reasonably perceive to be the employer's violations of a particular law. One of the most notable of these federal-level protections can be found in Title VII, which protects employees from retaliation for reporting or opposing perceived violations of Title VII, such as sexual harassment or racial discrimination.

Fastest-growing Category

According to the EEOC, retaliation claims are the fastest-growing category of claims filed. Therefore, employers need to be all the more aware of the steps they can take to avoid and minimize the effects of such claims.

The first step toward this goal is to establish a system that provides routine education to supervisors and managers regarding the company policy on retaliation and what retaliation is. Managers and supervisors should be counseled to seek out upper management or human resources when the possibility of a retaliation issue arises. As always, employers should ensure that their employee handbooks and manuals clearly explain that company policy prohibits all forms of retaliation against employees who complain about discrimination, harassment and other forms of illegal activity. The handbooks and manuals should also explain the appropriate procedure for reporting complaints. If an employee reports an act of retaliation, the employer should promptly and thoroughly investigate it. Employers must also carefully document an employee's history with the company and provide a detailed, legitimate explanation for all actions taken with regard to all employees.

Employer-initiated Changes to At-will Employment

The state legislatures and Congress are not the only parties to change the nature of at-will employment. Employers, too, have sought to adapt at-will employment to suit their changing needs. Unlike the legislatures, though, employers make modifications through contracts.

Restrictive Covenants as a Means to Modify At-will Employment Contract

An important example of an employer-driven modification to at-will employment is the use of restrictive covenants in employment contracts. Increasingly, employers are

requiring prospective employees to sign agreements prohibiting the employee from competing against the employer after the employment relationship ends. Generally, restrictive covenants are terms in an at-will contract that establish an ongoing obligation, despite the at-will nature of the underlying employment relationship.

The use of restrictive covenants has grown primarily because employers today, in a variety of business areas, place great value on employee knowledge and skill, and employers use restrictive agreements to safeguard the skills and knowledge they have imparted to their employees. Restrictive covenants, therefore, address the conflict between two competing concepts. On the one hand, employees acquire knowledge and skill through a certain employment relationship, and believe that what they have learned belongs to them and is theirs to take with them when they leave. On the other hand, employers invest significant amounts of time and money into each employee and feel that they have some right to reap a return on that investment. So, while an employer cannot force an employee to remain with the company, a restrictive covenant allows an employer to prevent former employees from using the knowledge and skills they have obtained for the benefit of another employer.

Narrow Covenants

The law of restrictive covenants has always involved this conflict of interest between the free market and the use of contracts to protect business interests. Generally, courts have enforced restrictive covenants when the agreements are no broader than necessary to protect the employer's legitimate interests, and are reasonable in duration and geographic scope. Furthermore, many courts also require that restrictive covenants do not unduly burden the employee and also do not harm the public interest.

Strict Requirements

Judicial enforcement of restrictive covenants in at-will employment agreements can be particularly oppressive from the employee's standpoint. For this reason, some courts have imposed stricter requirements before enforcing such agreements against at-will employees, particularly when there is a perception that the employee was unfairly terminated. Some courts have even refused to enforce a covenant if it finds that the employee's dismissal was unfair. It should be noted, however, that this approach is a departure from the manner in which courts typically handle restrictive covenants in at-will employment agreements, and many courts continue to enforce these agreements regardless of the circumstances surrounding the employee's termination.

As the discussion above indicates, a court's inspection into the reasonableness and appropriateness of any given restrictive covenant is of a highly factually specific nature. For this reason, it is important to use the utmost caution when drafting restrictive covenants. Just as a thoughtlessly crafted employee handbook can cause an employer problems, so too can a carelessly drafted restrictive covenant. Before requiring that an employee sign such an agreement, it is recommended that an employer consult with an experienced employment law attorney.

Alternative Dispute Resolution as a Method for Addressing Employment Issues

While mandatory arbitration agreements do not modify the at-will employment relationship in the same way that restrictive covenants may, arbitration agreements are contracts that modify an employee's rights by limiting his or her ability to file suit in state or

federal court. In this way, arbitration agreements serve as an effective means of limiting employment-driven litigation.

The relatively large number of employment disputes filed in state and federal court has caused many employers, large and small, to consider alternative means for resolution of employment disputes. One such method is for employers to establish their own dispute resolution systems. Such systems received endorsement from the U.S. Supreme Court in its 1991 ruling in *Gilmer v. Interstate/Johnson Lane Corp.* (500 U.S. 20) in which it held enforceable a mandatory arbitration provision in a non-union employment contract. Since the Supreme Court's *Gilmer* decision, lower federal courts have upheld mandatory arbitration provisions in non-union employment contracts for issues ranging from sex and race discrimination to claims arising under the Employee Retirement Income Security Act. In 2001, in *Circuit City Stores, Inc. v. Adams* (532 U.S. 105), the U.S. Supreme Court effectively held that, under the Federal Arbitration Act (FAA), an employer could require, as a condition of employment, that an employee sign an agreement requiring that all disputes arising out of the employment relationship be submitted to binding arbitration.

Benefits of Arbitration

Arbitrating instead of litigating employment claims can benefit employers in several ways. Arbitration is often faster, more private and less costly than litigation. Additionally, in arbitration there is no jury. Therefore, employment claims that would ordinarily settle long before trial are more likely to proceed to a conclusion before a neutral arbitrator. Arbitration of employment related claims can be often accomplished through organizations dedicated to alternative dispute resolution (ADR). These organizations offer arbitrators skilled in ADR who have specific expertise in the relevant areas of law.

Obviously, the desirability and feasibility of requiring mandatory arbitration of employment-related claims varies from employer to employer, but, if an employer decides to require arbitration, it should keep several things in mind.

Considerations in Requiring Arbitration

- First, while placing information regarding a company's arbitration policy in the employee handbook is a good idea, the employer should also consider having each employee sign a separate arbitration commitment. A separate arbitration commitment is advisable because some courts have refused to uphold an arbitration agreement when the only notice of the agreement is contained in the employee handbook.
- Second, because virtually any claim can be arbitrated, it is also advisable to define as broadly as possible the scope of all claims that the employer intends to be arbitrable. Specifically, employers should be careful not to include language that a court could interpret to exclude certain post-employment claims, such as retaliation.
- Finally, an employer should make clear that its agents are third-party beneficiaries of the arbitration agreement. In so doing, an employer ensures not only that an employee must arbitrate his or her claims against the employer, but also against the employer's agents, including managers, supervisors and other employees.